Central Law Journal.

St. Louis, Mo., June 17, 1921.

RECALL OF JUDICIAL DECISION HELD TO BE UNCONSTITUTIONAL.

The Supreme Court of Colorado has rendered popular government a great service when it showed the inherent vice in a constitutional amendment adopted by the people of that state and certain other western states, providing for the recall of judicial cisions. This so-called reform was at once the most dangerous and fantastical, as well as the most enticing and insidious, of all the radical changes which were a part of the great wave of reform of constitutional restrictions and limitations which swept over the country during the administrations of Roosevelt, Taft and Wilson, until it was stopped by the World War which broke out in 1914.

This radical movement, so far as it concerned the great mass of voters, was a protest against the intrenchment of wealth and corporate privilege behind the Constitution. The indignation of the people was fanned into flame by ultra conservative decisions of the Supreme Court, such as that in the Income Tax cases. Many new political parties and class alignments were the outgrowth of this intense activity of the poplar mind and feeling. The Progressive Party was the most conservative and the Non-Partisan League probably the most radical, of such parties. The Socialist Party took on new life and carried elections in many parts of the country. I. W. W. ism lifted its menacing head and sought to sink its poisonous fangs into the body politic. The popular mind was seething with impatience and new reforms were hailed with wild acclaim and discussed on farms and in factories and on street corners and at cross-roads. It looked for a time after the close of the war that this era of radical change would be resumed, but economic changes brought about by the war and the pressing needs of world recuperation and rehabilitation have had a sobering effect upon the people and a healthful reaction has set in which will no doubt make permanent all the good and get rid of all the bad that was in the program of the era of radicalism which has been ended, at least temporarily.

There can be no doubt, that, despite the unfortunate endorsement of Roosevelt, which, it is said he afterwards regretted and modified, no reform adopted during this period was more dangerous to the public welfare than the recall of judicial decisions. The recall of judges is conservatism itself compared with the ultimate effect upon our form of government of such a political device as the recall of judicial decisions. To transfer to the hustings, the intricate, delicate and difficult problems that arise out of the conflicts of human existence as well as the construction and application of laws and their adjustment to other laws and to the superior restrictions of federal and state constitutions is the height of political folly.

It is in the steadier and clearer light of the present period of calm reflection that the Supreme Court of Colorado is able to reach and render two decisions which a few years ago would have raised a storm of indignation all over the country. These decisions make it clear how impossible it is, from the standpoint of the Federal constitution, for a state statute to take away from *nisi prius* courts the power to pass on constitutional questions or to refer decisions on such questions to the people for decision. People v. Max (No. 9823, April 4, 1921), and People v. Western Union Tel. Co. (No. 9522, April 4, 1921).

The Telegraph Company Case involved the simple question of whether a *nisi prius* court could be prohibited from hearing and determining a Federal constitutional question. The case involved the enforcement of "The Anti-Coercion Act" of Colorado, prohibiting an employer from making it a

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condition of employment that employees should not join a labor union. The defendant raised the issue that the act was contrary to the Federal Constitution. The state objected to the consideration of the Constitutional question on the ground that the consideration was prohibited by Sec. 1, Art. VI of the State Constitution. The trial court overruled the objection and gave judgment for the defendant. This judgment the Supreme Court has just affirmed, and in doing so has just ended a period of uncertainty and confusion with respect to the jurisdiction of *nisi prius* courts in Colorado to consider constitutional questions. The constitutional provisions construed in the Telegraph Company Case was the Amendment to Sec. 1, Art. VI of the Constitution, which provides:

"None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people in cities acting under Article XX hereof as in violation of the constitution of this state or of the United States."

The Court held that this Amendment violated Par. 2, Art. VI of the Constitution of the United States, which provides that "the judges in every state shall be bound" by the provisions of such Constitution. On this point the Court said:

"It is said that the judge's oath to support the constitution of Colorado bound him to give effect to that clause thereof prohibiting him from declaring a legislative act contrary to the Federal constitution. The answer is that any section of the state constitution which is contrary to the Federal constitution is, for that reason and to that extent, null and void. It is no part of the state constitution and no legerdemain of logic can cover it with the sanctity of a judge's oath."

Although the question of the recall of the decision of the Supreme Court, holding the Anti-Coercion Act void under the Federal Constitution, was not directly raised by this appeal, the Court seized upon a suggestion in the brief of the state's attorney, that the question must ultimately be referred to the people, to declare that the people have no authority to pass on such a question and that a recall of the decision in this case would not be valid. The provision of the Colorado Constitution relating to the recall of judicial decision provides that a decision of the Supreme Court holding any act of the legislature unconstitutional shall not become binding until sixty days after it has been filed. If during that time a referendum petition signed by five per cent of the electors is filed with the Secretary of State, the decision is suspended until the next general election, when the people vote on the question whether the particular law shall be approved or not. If the law is approved the decision is overruled. The Court held that this provision for recall of decisions did not apply to a decision of the Supreme Court in refusing to enforce an act which was contrary to the Federal Constitution. On this point the position of the Supreme Court of Colorado is clear and unanswerable. The Court said:

"The original constitution of Colorado was a solemn compact between the state and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal constitution, and by the oath they have taken in conformity therewith and with their own constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appommatox.

"When a Federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine

it. That right so given, can neither be taken away nor that duty abrogated by the State of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the constitution of the State of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions."

The Max case, decided on the same day, extended the principle of the Telegraph Company Case to decisions invalidating acts of the legislature because contrary to the State Constitution. This result was reached by reliance on the familiar principle that where a separation of valid and invalid provisions of a statute cannot be made the whole act must be pronounced void. On this point the Court said:

"It is inconceivable that the people of Colorado would ever have enacted this law had they realized that in no event could it ever be applied further than to their own constitution, or that they would ever have considered the advisability of taking from their own courts the power to construe their own constitution had they realized that while the constitution of the United States stands they were impotent to deprive those same courts of power to construe that charter. The rule as to the divisibility of a constitutional provision, a portion of which is held void, is the same as that applied to a statute under similar conditions."

The Court also held the Amendment even as applying to cases involving the State Constitution to be contrary to the "due process" clause of the Federal Constitution. On this point the Court made the following observation:

"If an unconstitutional statute, creating a crime unknown to the common law, may be passed by the legislature; if a citizen may be put upon trial thereunder; if the trial court may be prohibited from hearing his plea that the statute violates the constitutional guaranties of his state; if, when this court has so held, that statute may be re-enacted by a bare majority of those voting thereon and the severest penalties be thereupon inflicted; then law has become a phantom and justice a dream, and constitutional guaranties of the sacredness of life, liberty and property,

"a tale
Told by an idiot, full of sound and fury,
Signifying nothing."

"It follows from what has hereinbefore been said that all those provisions of amended Sec. 1, of Art. VI of our state constitution which purport to furnish the plan and machinery for the nullification of the decisions of this court holding state laws and city charters contrary to the state constitution are null and void and are not subject to the prohibition that they shall not be binding until sixty days after the date of their filing, but stand on the same footing as other decisions of this court."

These two decisions will be hailed by the bar of all the states as establishing effective bulwarks against an attack upon the judiciary more serious and menacing than any ever before made in the history of jurisprudence. They stand on a plane with Lord Coke's defiance of King James' interference with justice in the Seventeenth Century. The judges of the Supreme Court of Colorado, as well as the lawyers who as *amici curiae* assisted the Court in reaching a decision (among whom we notice the name of our good friend, Hon. T. J. O'Donnell of Denver), deserve the praise and gratitude of the profession everywhere for having rendered a distinct service to the cause of American jurisprudence.

NOTES OF IMPORTANT DECISIONS

THE MODERN TEST OF NAVIGABILITY.—**The old test of navigability, the ebbing and flowing of the tide, shows the narrow provinciality of the common law. Because the Englishman knew in his experience of no other rivers which were navigable, in which the tide did not ebb and flow, therefore all rivers were navigable only when the tide appeared at regular intervals. The American test of navigability has gone through several experimental stages. It is not determined by the mode of conducting its commerce nor the difficulties of navigation, but whether "it is capable in its natural state of being used for purposes of commerce no matter in what mode such commerce may be conducted." The Montello, 20 Wall. 430.**

The Supreme Court of the United States has recently applied this rule to that much advertised highway of commerce connecting Lake Michigan with the Mississippi River by means of the Chicago-Des Plaines-Illinois rivers route. These streams have been united by artificial means which form internal barriers to navigation, and the route, for that and other reasons, has not been a success; and the riparian owners, especially those abutting on the banks of the Des Plaines river near Joliet have regarded the abandonment of the stream as an artery of commerce as determining the fact of the non-navigability of the stream and begun to erect dams and other obstructions in the stream without the consent of Congress. The Supreme Court, in a recent case, sustained an injunction against the erection of such obstructions and declared that Congress is the final arbiter of navigability and its consent must be obtained in cases of doubt. Economy Light & Power Co. v. United States, 41 Sup. Ct. 410. In this case the Court held that if a river, which, after practical service as a highway of commerce for a century and a half, has fallen into disuse partly through changes in the course of trade, or methods of navigation, or changes in its own condition, and partly as the result of artificial obstructions, and has not been used for almost 100 years, is to be abandoned as a highway of commerce, it is for Congress, and not for the courts, to so declare.

Although this river lies wholly in the State of Illinois, the Court held that it came within the purview of Ordinance of July 13, 1787, art. 4, providing that the navigable waters leading into the Mississippi and St. Lawrence should be common highways and forever free, although this did not make streams navigable in law unless so in fact, but simply declared the public rights therein so far as they were navigable in fact.

The Court further held that to the extent that it pertained to internal affairs within the present State of Illinois, the Ordinance of July 13, 1787, was superseded by the admission of the State of Illinois into the Union; but, so far as it established public rights of highway in navigable waters capable of bearing interstate commerce, it could not be repealed by one of the states.

On the question of navigability the Court held that the test is whether the stream in its natural state is capable of being used as a highway and that the question of navigability is not affected by the fact that there are obstructions in the stream, carrying places and portages, or whether it is open at all seasons or at all stages of the water. Finally it is for Congress to pass finally on the question and a private riparian owner cannot risk an investment on the question of navigability without consulting Congress. On this point the Court said:

"We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. And we agree that the provisions of section 9 of the Act of 1899 (30 Stat. 1151) apply to such a stream. The act in terms applies to "any * * * navigable river, or other navigable water of the United States"; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the time of its passage, or now are, actualy open for use. The Des Plaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation. Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the act of 1899, and, in the present case at least, nothing remains but to give effect to it."

VIOLATION OF SAFETY APPLIANCE ACT MUST BE THE PROXIMATE CAUSE OF INJURY TO JUSTIFY ACTION UNDER THAT ACT.—The Safety Appliance Act does not give a right of action to one injured simply because that act has been violated in respect of the car or train in which plaintiff was injured, unless it be shown that such violation of the Act was the proximate cause of the injury. Lang v. New York Central Ry. Co., 41 Sup. Ct. Rep. 380. In that case a car not equipped with couplers as required by Safety Appliance Act, § 2 (Comp. St. § 8606), was standing on

a siding. A train crew began to kick other cars on the siding, but did not intend to disturb, move, or couple any of the cars to the crippled car. It was the duty of a brakeman to stop the moving cars before coming in contact with the crippled car, but plaintiff's intestate failed to perform such duty, and his foot was caught between the moving cars and the crippled car, and he was injured. The Court held that the collision was not the proximate result of the defect in the car.

The contention of plaintiff in this case was that the absence of a coupler attachment and bumpers on the crippled bar caused plaintiff's leg to be crushed when the cars came together, and cited in support of this contention the case of Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, where the Supreme Court held it to be an "absolute duty" resting upon common carriers to provide couplers for every car and that by omission of this absolute duty "the carrier incurs a liability to make compensation to any employee who is injured by it."

On the other hand, the contention of the defendant adopted by the Court was that "the proximate cause of the accident was the failure of the deceased to stop the cars before they came in collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause."

In support of this contention the defendant cited the decision in the case of St. Louis & San Francisco R. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785. In that case the injury occurred by reason of a collision with a defective freight car. The deceased was riding on the front of the colliding car, and while an injury might have been avoided if the freight car had been equipped with a coupler attachment and bumper, yet, since the deceased was not attempting to couple the defective car, the absence of a coupler was held not to be the proximate cause of the injury. In this case the Court states the purpose of the Safety Appliance Act when it says that "nothing in its provisions gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.' 27 Stat. 531."

Justice McKenna, in his opinion in the principal case, declares that it was the duty of the deceased not to couple the defective cars, but to stop the colliding car and to set the brakes upon it so as not to come into contact with the crippled car. "That duty," said Justice McKenna, "he failed to perform, and, if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, "still the collision was not the proximate result of the defect," or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law "but only that, had they been complied with, it (the collision) would not have resulted in injury to the deceased."

There can be no doubt that lawyers and trial courts have been much confused by the Layton and Conarty Cases. In the Lang Case the trial court frankly relied on the Layton Case and the Appellate Court (N. Y.) relied specifically on the Conarty Case. Justices Clarke and Day dissented in the principal case and the former expressly bases his dissent on the Layton Case, which he regards as controlling and which he explains as follows:

"The Layton Case, supra, coming after the Conarty Case, decided (all the members of this court as now constituted concurring) that: 'Carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when in the discharge of duty.'

"And the Gotschall Case, 224 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, clearly proceeded upon the same principle. Neither of the men injured in the Layton or Gotschall Cases was engaged in coupling or uncoupling cars when the accident occurred, but each was injured because of defective coupling appliances when he was going over the cars of his train in the discharge of his duty. Here Lang was injured, when in the discharge of his duty, because a defective car had been placed upon a much-used track in a busy yard in such a position that it was impossible for him, in the exercise of due care, to prevent the cars he was seeking to control from coming in contact with it. It would be difficult to conceive of a case in which the negligence of the master could be a more immediate and proximate cause of injury to a servant than it was in this case. Having regard to the extent to which this case must be accepted by other courts as a rule of decision, it would seem that the orderly and intelligible administration of justice required that the principle of the Layton and Gotschall Cases should be disavowed or overruled, for that principle is so plainly in conflict with the opinion in this case that courts and advising counsel will otherwise be left without any rule to guide them in the disposition of the many similar cases constantly pressing for disposition."

CONDITIONS IN ENGLISH SHIPPING DOCUMENTS.

There is a probability that British law on this subject may, at a not distant date, be brought into line with the well-known Harter Act of the United States, passed in February, 1893. It is only right to mention, however, that before this legislation was adopted the American Courts had held that freedom of contract, as between goods-owner and carrier by sea, was limited in ways unknown to the English common law. A negligence clause in a bill of lading was held to be unenforceable and void as being against public policy.

The Hunter Act has a double purpose. It makes it unlawful for the shipowner to insert certain exemptions from liability in his contract. It also provides certain statutory grounds of exemption in favor of the shipowner, subject to certain conditions. The Act obviously would be enforced in any United States Court in regard to any contract made in the United States for shipment from a United States port. The Courts have also held that it applies to any contract, wherever made, for the carriage of cargo to a port in the United States, and this would be the result even in regard to a bill of lading signed in England and expressly providing that the contract should be subject to English law.

The American Harter Act has been imitated by the Parliaments of the Commonwealth of Australia, of New Zealand, and of the Dominion of Canada. The Australian Act (sect. 7) and the Canadian Act (sect. 12) impose a penalty on any master or agent who issues a bill of lading containing terms declared by the Acts to be illegal. As the issue of a bill of lading by a captain or agent in an Australian or Canadian port would be an act done within the Australian or Canadian jurisdiction, the effect of this is that the Acts have to be incorporated in bills of lading issued in Australia or Canada in the same way as the Harter Act (by reason of sect. 5 of that Act) is incorporated in bills of lading issued in the United States.

Such legislation in the British Dominions has led to complaints from commercial bodies in the United Kingdom as to the practice of shipowners inserting conditions in their contracts which, under the law of the United States and the British Dominions referred to, are not allowable. An Imperial Shipping Committee was appointed to consider these complaints and their report which has lately been issued may, as already indicated, lead to a change in the law.

By the common law of England the shipowner, says the report, is responsible for the safe carriage and delivery of goods committed to his charge as a common carrier, but there is nothing in English law to stop him from contracting out of the whole or any part of his liability, and by a practice which has gradually extended since about 1880, British shipowners do habitually in their bills of lading contract themselves out of their common law liability to a large extent.

The liability of the shipowner relates to risks of two kinds. There are navigation risks, due to perils of the sea and other incidents of navigation; and there are carriers' risks, which are those of loss or damage to goods arising in the course of their receipt, stowage, custody, and delivery by the shipowner and his servants. The present demand for legislation is to prevent the shipowner from contracting out of his liability in respect of carriers' risks only. By general consent of all the parties concerned, he should continue to be free to relieve himself of his liability in respect of navigation risks from whatever cause. The practice of inserting the contracting-out clauses in bills of lading continues, notwithstanding that there is a widespread and persistent demand among commercial organizations throughout the Empire for legislation to render such clauses illegal.

On the one hand, the shippers submit to the insertion of the clauses in question, and yet through their organizations generally object to them; and, on the other hand, the shipowners insert the clauses, and yet many of them—and perhaps a majority—do not as a rule avail themselves fully of the rights which they so obtain. It seems to follow from such a situation that there is at any rate a *prima facie* case for legislation in the sense asked for, and that such legislation would appear likely to be a protection rather than otherwise to such shipowners as make it a practice to pay reasonable claims. It is argued that it would make for simplicity if he were also allowed to continue to contract himself out of his "carrier's risks," thus in effect throwing upon the shipper's underwriter the whole of the risks of every kind. Such simplicity does not, however, under present conditions appear to be attainable, for since pilferage has become rife underwriters both in London and Liverpool have not only refused to cover "risks of whatsoever kind," but have also refused to cover more than 75 per cent of the losses due to pilferage. Their object, it was explained to the Committee, was to make shippers more careful in packing and shipowners more diligent in supervising their servants.

The Committee recommended uniform legislation throughout the Empire dealing with shipowners' liability and they suggest that the measure should be framed on the lines of the Canadian Water Carriage of Goods Act, 1910, subject to certain further provisions in regard to:

(1) Exceptional cases in which goods should be allowed to be carried by shipowners at owner's risk;

(2) The precise definition of the physical limits to the shipowner's liability;

(3) The fixing of maximum values for packages up to which shipowners should be liable to pay.

And they concluded their report with the remark:

"We make the Canadian Water Carriage of Goods Act, and not the Harter Act which it closely resembles, the basis of our recommendation because it embodies the latest experience. It was passed in 1910, whereas the Australian Sea Carriage of Goods Act was passed in 1904, and the New Zealand Shipping and Seamen Act, certain sections of which deal with shipowners' liability, was passed in 1903. The Harter Act was passed in 1893."

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APPLICATION OF THE SCINTILLA RULE BY THE COURTS.

The right of trial by jury of ancient and obscure origin has been safeguarded by provisions in each of the Constitutions of Kentucky and by amendment to the Federal Constitution. Other States have caused similar provisions to be incorporated in their organic law.

Courts existed before juries and when the latter were called in to assist in the ascertainment of disputed facts, the courts reserved to themselves the right and still continued to pass on numerous questions of fact.

That disputed questions of law are for the Judge has always been true in practice as well as theory; that disputed questions of fact are for the jury is a proposition theoretically sound, but never followed absolutely in point of practice.

Incidental questions of fact which must be decided by the Court are constantly arising in every trial. Writings, the construction of which was a function of the Court, when juries, who in the early days could not read, came in, continued to be interpreted by the courts. What a foreign law may be is determined by the Court; the definition of legal terms, such as "malice," "false pretenses," "reasonable notice," are laid down for the jury's guidance by the

Court. The limits within which testimony must be confined, the extent to which collateral facts may be considered, the determination of what is relevant to the issue are all matters exclusively under the control of the Court. It alone determines what presumptions may be considered conclusive and which merely *prima facie;* it decides what the undisputed facts show as to proximate cause; it may declare a witness not competent before the jury is given an opportunity to say whether he is credible.

It is not strange, therefore, that the courts in the exercise of their functions have apparently encroached at times upon the province of the jury, nor is it a matter of surprise that the exact line of demarcation separating the functions of each is not always clearly outlined.

The present practice of directing verdicts, which has developed largely in the last seventy-five years, succeeds what was known at common law as a demurrer to the evidence.[1]

Soon after the practice of hearing witnesses by a jury came into existence, says James B. Thayer, this method of attempting to substitute for the jury's opinion on the evidence, that of the Court was devised. While it was claimed that this, like other demurrers, raised merely a question of law, in reality its effect was to withdraw from the jury all consideration of the facts and to submit to the Court, whether it were possible to give a verdict for the party producing the evidence as a matter of legitimate inference from the testimony introduced.

That the same difficulties experienced by modern judges, confronted the older judges who were called upon to say where the dividing line separating the functions of Court and jury lay, is seen by reference to the noted case of *Gibson* v. *Hunter*, (1793)[2] in which Ch. J. Eyre said:

"The questions referred by your lordships to the judges arise upon a proceeding, which is called a demurrer to evidence, and which though not familiar in practice, is a proceeding well known to the law. It is a proceeding by which the judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shown in evidence, analogous to the demurrer on facts alleged in pleading. My Lords, in the nature of the thing, the question of law to arise out of the fact, cannot arise till the fact is ascertained.

"It is the province of a jury to ascertain the fact, under the direction and assistance of the Judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence, and a bill of exceptions, the distinct lines of which have not always been kept so much apart as they ought to have been."

In this case it was held, thereby announcing a new rule, that before the party demurring to the evidence could insist upon the opposing party joining in the demurrer, he must distinctly admit *upon the record*, "every fact and every conclusion which the evidence given for the plaintiff conduced to prove."

The courts of a very limited number of States, among them Kentucky, have regarded the constitutional provisions above referred to as of such compelling force that in a trial of causes where the party upon whom the affirmative rests produces in support of the issues competent and relevant evidence, slight and unconvincing though it may be, the question must be submitted to the jury, even though the Court upon application would set aside a verdict based upon such evidence. That is what is known as the Scintilla Rule.

Among the first cases declaring this rule in Kentucky is that of *Thompson* v. *Thompson*.[3] The Court in that case marked out the boundary line beyond which courts are not permitted to go in the exercise of their supervisory powers in the trial of causes. That rule has been adhered to consistently to this day, and the only remedy against a verdict supported only by slight and unconvincing evi-

(1) Schuchardt v. Allens, 1 Wall. 359, 370.

(2) 2 H. Bl. 187.

(3) 17 B. Monroe, 22.

dence is by motion for a new trial. Of this supervisory power over verdicts universally exercised by our courts even the most ardent champion of the right of trial by jury cannot complain, because the litigant whose temporary success has been thus nullified will have his right to a retrial before another jury.

Besides, the practice of granting new trials as against the evidence having been exercised by the courts before the adoption or amendment of many of our State constitutions and possibly before the adoption of the Federal Constitution, this practice has an implied constitutional recognition.

The courts in Kentucky have assumed and there is a limitation upon their supervisory powers over verdicts without pointing out the source of the limitation. They undoubtedly have regarded the Scintilla Rule as not requiring elaborate argument and have assumed the rule found abundant justification in the constiutional provisions guaranteeing the right of trial by jury.

The reasons supporting the doctrine are more elaborately stated in *McDonald* v. *Metropolitan St. R'y. Co.*,[4] thus:

"The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a retrial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest. While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet that in every case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confines to juries, and not to courts, the determination of the facts in this class of cases."

The application of the Scintilla Rule in Kentucky has resulted, through new trials for insufficient evidence to support the verdict, in increased costs to litigants, delays in the administration of justice by retaining upon the docket causes which by reason of being supported by slight and unconvincing evidence may be said to be trivial.

Other jurisdictions have rejected the Scintilla Doctrine and have followed the rule of which that in the Federal courts is typical, viz.: "Where the evidence in support of the issues adduced by one having the affirmative is of such character that the Court would set aside the verdict if rendered in favor of such party, it is the duty of the Court upon motion to direct a verdict for his adversary."

The question then upon a motion for a directed verdict is not whether there is no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus is imposed.

The reasons for the rule are thus enumerated by Mr. Justice Swayne in *Merchants Bank* v. *State Bank*.[5]

(1) It is idle to proceed further when it is inevitable that the plaintiff can not recover.
(2) It saves time and costs.
(3) It gives the certainty of applied science to the results of judicial investigation.
(4) It draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the Court.

The Federal courts and the courts of those jurisdictions in which the Scintilla Doctrine has been exploded have not regarded and do not regard the constitutional right of trial by jury as a barrier to the

(4) 167 N. Y. 66.

(5) 10 Wallace, 604.

saner and more expeditious rule whereby the courts can put an end to litigation that is trivial, because the issues are not supported by evidence, which, with all justifiable inferences to be drawn from it, is insufficient to support a verdict for him who has the affirmative.

In fact, under the general principle that the Court may always restrain a jury from conduct which will not stand the test of reasonableness and good sense, courts occasionally sweep aside, as unworthy of serious consideration, testimony which strains credulity beyond the limits set by experience and sound sense. This is illustrated in the case of *Weltmer* v. *Bishop*,[6] where a magnetic healer, claiming supernatural powers and the possession of the same powers exercised by the Saviour of mankind to cure diseases, recovered a verdict in a libel suit where he had been described as a "miserable charlatan," although a large number of witnesses claimed to be cured by the treatment. The Court said:

"Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility. They are not required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it."

The fundamental law constituting jurors as triers of questions of fact in these jurisdictions does not inhibit a sound, safe, wise and prudent rule which when applied in proper cases results in directed verdicts. To submit a question for determination by the jury when the Court would be required to set aside at once a verdict given in opposition to that requested is indeed a vain thing. Such procedure prolongs rather than ends litigation. It denies rather than subserves justice. It increases rather than diminishes the expense of litigation. The vexations resulting from a prolonged contest between the Court and its jury because of insufficient evidence to support the verdict led a Justice of the Kentucky Appellate Court to the despairing declaration: "If the juries will not quit, the courts must."

Under sanction of the Code the third verdict rendered under the application of the Scintilla Rule must stand, however unjust it may be.

An abandonment of the Scintilla Rule and the direction of a verdict upon request where the evidence supporting an issue in a cause is so meagre as not to justify a verdict in favor of the party producing it does not trench upon the Constitutional function of the jury. As shown above, it is not wholly true that it is the province of the jury to decide all questions of fact. The Court, even in those jurisdictions where the Scintilla Rule prevails, can in its capacity of supervisor of verdicts, say as a matter of law after the verdict, that the evidence is so slight as not to furnish a foundation on which it could rest, and set the verdict aside. If the Court's action after verdict does not invade the province of the jury, by what process of reasoning can it be said that the Court encroaches upon the right of trial by jury if upon the same state of facts it decides that the evidence, though *tending* to support the issue, is so vague and indefinite as not to warrant its submission to the jury?

The law looks to substance, not shadow; is the embodiment of common sense, not refinement, and its end is justice, not injustice. No party should be permitted to have judgment without proving his cause, but such results obtain under the application of the Scintilla Rule. The border line between meager and substantial evidence to support issues may be difficult of description, but it presents no greater difficulty before than after verdict. The courts after verdict must and do find this line of demarcation, and in so doing have not been seriously charged with invading the province of the jury.

The observations made by Judge Severens, then upon the Circuit Court of Appeals bench, in *Minahan* v. *Grand Trunk West-*

(6) 171 Mo. 110.

ern R'y. Co.,[7] are of assistance to a court seeking to avoid invading the province of the jury and at the same time to accord legal justice. He said:

"Undoubtedly, it is distinctly settled that a mere scintilla, a spark, which arrests attention, and then from mere lack of vitality fades away, is not sufficient to warrant the submission of an issue of fact to a jury, when the scintilla is all that is developed by the party having the burden of proof. Such a showing has no substance, has not the quality of proof, and the judge may lawfully say so to the jury. And it must be admitted that the Supreme Court has gone a step farther than this, and assigned to the province of the Court the right to direct the jury in those cases standing between those where there is a mere scintilla and those where there is substantial evidence, standing in a borderland, so to speak, where the evidence is so vague, indefinite or inconsequential as not to furnish a reasonable foundation on which a verdict could rest."

The application of the Scintilla Rule finds justification only in an illogical construction of that provision of the Constitution guaranteeing the right of trial by jury, a construction wholly at variance with the spirit of the instrument. It is founded upon refinement in reasoning rather than upon common sense. It promotes injustice because after successive verdicts the verdict must stand, although not supported by sufficient evidence, and impairs confidence in jurors as triers of the facts.

It would appear that the inherent right which is admittedly possessed by the courts to set aside verdicts as against the weight of evidence, logically involves the right to say directly that which is reached by indirection, and thereby avoid the wasting of valuable time of court and litigant.

Most of the criticism which finds an easy target in the law's delay will be silenced if the courts, disregarding a conventional fiction, do at the outset that which they foresee will be inevitably required of them at the end.

S. D. ROUSE.

Covington, Ky.

(7) 138 Fed. 37.

ELECTRICITY—POWER TO REGULATE RATES

SOUTHERN IOWA ELECTRIC CO. v. CITY OF CHARITON.

Argued Jan. 26 and 28, 1921. Decided April 11, 1921.

41 SUP. CT. 400

Where gas and electric corporations and the governmental agencies dealing with them have power to contract as to rates and exert that power by fixing contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and the question whether the rates are confiscatory becomes immaterial.

At the time these suits were begun the appellants were engaged in supplying electricity or gas to the municipal corporations who are the appellees. This service was being rendered by virtue of ordinances conferring franchises to use the city streets during 25 years in two of the cases and 20 years in the other. The ordinances contained a schedule of maximum rates. After they were in effect a few years the three suits which are before us were begun against the cities with the object of preventing the enforcement of the maximum rates specified in the ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the three cases the court granted a temporary injunction restraining the enforcement of the maximum rate and allowed an order permitting pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations, although their operation would be confiscatory. In one opinion, applicable to the three cases, the court stated its reasons for maintaining this view, but directed attention to the fact that no proof had been offered concerning the confiscatory character of the rates, and pointing out that as such subject might become important on appeal, it would be necessary to restore the cases to the docket for proof in that regard unless the situa-

tion was remedied by agreement between the parties. Thereupon the pleadings were amended so as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which are now before us for review because of the constitutional question involved.

Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; Knoxville v. Knoxville Water Co., 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371; Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Minnesota Rate Cases, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48, L. R. A. (N. S.) 1151, Ann. Cas. 1916A. 18; Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; Denver v. Denver Union Water Co., 246 U. S. 178, 194, 38 Sup. Ct. 278, 62 L. Ed. 649; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial, Freeport Water Co. v. Freeport, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679; Detroit v. Detroit City Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887; Cleveland v. Cleveland City Ry Co., 194 U. S. 519, 24 Sup. Ct. 756, 48 L. Ed. 1102; Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176; Minneapolis v. Minneapolis Street Ry. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, Columbus Ry. Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L Ed. 669, 6 A. L. R. 1648.

It follows that as the rates here involved are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it.

As to the first, assuming for the sake of the argument only, that the public service corporations had the contractual power, the issue is: Had the municipal corporations under the law of Iowa such authority? Its possession must have been conferred, if at all, by section 725 of the Iowa Code of 1897 which deals with that subject. That statute came before the Supreme Court of Iowa for consideration in the very recent case of Town of Woodward v. Iowa Railway & Light Co., 178 N. W. 549. That was a suit by the town of Woodward to compel the light company to continue to furnish electric lighting at the rates fixed by the ordinance conferring upon the company its franchise to maintain and operate its plant in the town. The company resisted on the ground that the rates had become confiscatory and were not enforceable. Testimony offered by the company to establish the confiscatory character of the rates was objected to by the town, which asserted that the acceptance by the company of the ordinance bound it by contract to furnish the service at the rates therein prescribed whether or not they were confiscatory, and that the evidence offered was therefore immaterial. The evidence was received, subject to the objection, and the court, finding the rates to be confiscatory, sustained the company's contention and dismissed the bill. Upon appeal by the town, the Supreme Court, affirming the action of the trial court, said:

"The defendant's franchise in the town of Woodward was granted in June, 1912, by ordinance duly enacted by the city council and duly approved by vote of the electors, as required by section 720 of the Code. Section 6 of the ordinance which granted the franchise specified the rates to be charged by the defendant to consumers. The term of the franchise was 25 years. The essence of the plaintiff's contention is that the enactment of this ordinance (including the franchise and the rates and the

approval of the same by the electors), and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and upon the utility corporation. The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:

"'Sec. 725. Regulation of Rates and Service. —They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power and to supply said city or town with water for fire protection and with gas, water, light or power for other necessary public purposes (and to regulate and fix the rent or rates for water, gas, heat and electric light or power), * * * and these powers shall not be abridged by ordinance, resolution or contract.'[1]

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. * * * There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. * * * By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either ignorantly or corruptly, and utility corporations became empowered through the contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council It must be said, therefore, that the rates fixed by section 6 of the ordinance hereinbefore referred to, were not fixed by contract."

The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law. Covington v. Kentucky, 173 U. S. 231, 241, 19 Sup. Ct. 383, 43 L. Ed. 679; Worchester v. Worchester Street Ry. Co., 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450; Englewood v. Denver & South Platte Ry. Co., 248 U. S. 294, 296, 39 Sup. Ct. 100, 63 L. Ed. 253; Pawhuska v. Pawhuska Oil Co., 250 U. S. 394, 399, 39 Sup. Ct. 526, 63 L. Ed. 1054.

Decrees reversed, and causes remanded for further proceedings in conformity with this opinion.

NOTE—*Power of State to Change Rates of Public Service Company Fixed by Agreement.*— It is held by a number of cases that the State Public Utilities Commissions, under appropriate grant of power, may authorize a public utility company to increase its charges in excess of the rate fixed in its franchise or contract with the municipality in which it operates. Chicago Rys. Co. v. Chicago, Ill., 126 N. E. 585; Scranton v. Public Service Com'n., Pa., 110 Atl. 775, Hoyne v. Chicago & O. P. El. R. Co., Illinois, 128 N. E. 587; Woodward v. Iowa R. & L. Co., Iowa, 178 N. W. 549; Mobile v. Mobile Electric Co., Ala., 84 So. 816; Public Service Comm., 111 Misc. 692, 182 N. Y. Supp. 55; Warsaw v. Pavilion Natural Gas Co., 111 Misc. 565, 182 N. Y. Supp. 73; Ohio & Colorado S. & R. Co. v. Public Utilities Comm., Colo., 187 Pac. 1082.

Such a contract is subject to legislative control. State v. Railroad Com'rs., Fla., 84 So. 444.

"The Legislature had the undoubted authority under the police power of the state to increase or decrease those fares as it deems proper, or to authorize the Public Service Commission to do the same. And this is true whether the franchise ordinance mentioned is considered as a contract or a regulation enactment; it having been enacted and agreed to subject to the police power of the state, it must give way upon the exercise of that power by the Legislature or by its duly authorized agent, the Public Service Commission." St. Louis v. Public Service Commission, Mo., 207 S. W. 799.

In Washington it is held that the Public Service Commision Law did not supersede the right of a city of the first class to insist on the enforcement of its rights under the terms of a franchise ordinance passed by the city and accepted by a street railway company prior to the going into effect of the law requiring the railway company to carry the city's policemen and firemen free when engaged in their official duties. State v. Seattle & R. V. R. Co., Wash., 194 Pac. 820.

In conformity with the reported case, it is held in City of Moorhead v. Union L. H. & P. Co., 255 Fed. 920, that a company which has contracted to furnish gas to a city and its inhabitants for a term of 10 years at fixed rates cannot be given

the right by a court of equity to violate its contract and increase its rates because war conditions have made them unprofitable.

The wisdom of insistence on a franchise contract fixing rates of charges, which would bring disaster upon the company, is not a question for the courts. Meridian L. & R. Co. v. Meridian, 265 Fed. 765.

By express provision of the Michigan statute creating a Public Utilities Commission, rates of a public service company fixed by agreement are not subject to control by the commission. Lenawee County G. & E. Co. v. Adrian, Mich., 176 N. W. 590.

BOOK REVIEW.

CORPUS JURIS—VOLUME 14A.

It is unfortunate that the compilers of Corpus Juris were not able to estimate in advance how many pages the subject of Corporations would take. They assigned to that subject Volume 14, but between the time the work was undertaken and the date it was finished, the subject of Corporations had grown to a greater extent than had any other subject of law. It has therefore required double the amount o space for its treatment that was given to it at first, and a greater space than was given to any other subject in Corpus Juris.

Volume 14A is devoted entirely to the subject of Corporations, beginning with Part 13, Officers and Agents; and includes a discussion of that theme; and also the following: Part 14, Corporate Powers and Liabilities; Part 15, Insolvency and Receivers; Part 16, Reincorporation and Reorganization; Part 17, Consolidation; Part 18, Dissolution of Forfeiture of Franchise; Part 19, Foreign Corporations.

There can be no doubt that there has never been published a text book on the subject of Corporations with a more careful discussion and classification of cases than is given in this article in Corpus Juris. This article has been prepared with a thoroughness that apparently has been given to no other subject in this book, due, no doubt, to the fact that this subject is one of the most, if not the most, important with which lawyers have to deal, because of the vast number of decisions which have to be read and classified.

Bound in one volume of 1434 pages.

HUMOR OF THE LAW.

"I do hope that when I am able to vote," said the pretty young wife, "I will be as influential in politics as my husband."

"How is that?" asked her friend.

"Why, he has voted in two Presidential elections, and both times his choice was elected."

—*Ladies' Home Journal.*

Mose Johnson was under sentence of death in a Kentucky jail, and as the fateful day drew near he grew very nervous about it. His keeper, a sympathetic man, suggested that Mose's only hope lay in an appeal to the Governor. As Mose could not write the keeper offered to write a letter from dictation.

Mose, after collecting his thoughts very earnestly for a full five minutes, dictated the following:

"Dear Marse Guv'nah: They's fixin' to hang me come this Friday, and here it am Tuesday? Mose Johnson."—*Everybody's.*

Elmo Gill and James Darling of Raleigh, N. C., were tried in city court for engaging in a fight that followed an argument over the ownership of a hornet's nest.

Evidence brought out at the hearing showed beyond a reasonable doubt that the nest was the property of Darling, which he said he had walked miles through the woods to find for the purpose of making a tea which he said he used for a cough.

"You are discharged," said Judge Harris to Darling.

Gill, apparently displeased with the decision, asked:

"How about me, judge?"

"Oh, you're stung," replied the judge. "You must cough up 10 and costs."

A lawyer was known to be a bit grasping. He had just made out a will for an old lady client who was passing away. The next day the old lady, very near the end, said to him: "About my will—I've added something to it. I've—given—you——"

"Just one minute, my good friend," said the shrewd lawyer, wishing to have witnesses for the remark. So he hurriedly called the family in, and when all were assembled he said to his old client: "Now say what you were going to say."

"I've—given—you——" and she stopped, her breathing becoming more and more labored.

"Yes, yes," urged the lawyer.

Then she finished: "——a great—deal—of trouble." —*Ladies' Home Journal.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Debtor and Creditor—Where an attorney who had received money for his client against whom he had an unsettled account for fees suggested to the client that he could make good use of the money and asked that the client let him have it until after a primary election, to which the client assented, the reasonable meaning of the conversation was that the client was willing to let the attorney keep the money until after the primary, when they would have a settlement, and not that the relation between them was changed from that of attorney and client to that of debtor and creditor. People v. Kwasigroch, Ill., 130 N. E. 344.

2. **Bailment**—Conversion.—It is not a conversion by a bailee to deliver goods to one not the owner, where such one is an officer of the law acting by virtue of process of law, and property turned over, on the referee's summary, order, to the owner's trustee in bankruptcy, must be treated as in the custody of the law.—Bank of Brookings v. Aurora Grain Co., S. D. 181 N. W. 909.

3. ——Improper Valuation.—Ordinarily a bailee in shipping goods to the bailor is liable for damages resulting from a failure to place a proper valuation on the goods at the time of delivering them to carrier. Whitehouse Bros. v. S. H. Abbott & Son., Tex., 228 S. W. 599.

4. **Bankruptcy**—Evidence of Value.—The fact that equities in real estate owned by the bankrupt produced little or nothing when sold under the hammer is not proof that they were of no value, so as to charge a creditor, who took security with knowledge of the existence of those assets, with notice a preference would thereby result. Sumner v. Parr, U. S. D. C. 270 Fed. 675.

5. ——False Pretenses.—Under Bankruptcy Act, § 17, subd. 2 (Comp. St. § 9601), excepting from discharge liabilities for obtaining property by false pretenses, or for willful and malicious injury to the person or property of another, a judgment in an action of replevin for the value of property obtained by the bankrupt by false representation that he was solvent and that his note for the property was good is not barred, though a judgment in replevin based on constructive fraud only would be barred, since "malicious," as used in the section, consists in the willful doing of an act with knowledge it is liable to injure another and regardless of consequences, and does not include the malignant spirit or specific intention to injure the other. In re Kalk, U. S. D. C., 270 Fed. 627.

6. ——Informality.—A referee has no right to refuse to file a claim presented on the ground of its informality. In re Drexel Hill Motor Co., U. S. D. C., 270 Fed. 673.

7. **Bills and Notes**—Fictitious Payee.—Where a person procured a draft from express company and named a fictitious person as payee, the indorsement of the draft by such person writing the fictitious name was a forged and unauthorized signature within Code Supp. 1913. § 3060a23, making such indorsement inoperative. American Express Co. v. People's Sav. Bank., Iowa, 181 N. W. 701.

8. **Brokers** — Compensation. — A written agreement stipulating that in consideration of services rendered by plaintiffs in negotiating a lease and renewals thereof and attending to the collection of rents, they should be paid a percentage on the rents and also a percentage on the sale price in case the landlord should sell to the tenant secured by them, held not to be within section 10 of the statute of frauds, relating to right of brokers to recover commission for selling or exchanging real estate. Burt v. Brownstone Realty Co., N. J., 112 Atl. 883.

9. **Carriers of Goods**—Conversion.—In an action against a railroad for conversion of a shipment, testimony as to what its freight agent said respecting delivery, being at most an unauthorized declaration by an agent as to a past transaction, was not competent as an admission against defendant railroad. Booth v. New York Cent. R. Co., Vt., 112 Atl., 894.

10. ——Inspection.—Allowing without permission inspection of corn shipped under a bill of lading providing, "inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper," did not amount to a delivery, and therefore a conversion by the carrier, under Carmack Amendment to the Interstate Commerce Act. Bernie Mill Gin Co. v. St. Louis Southwestern Ry. Co., Mo., 228 S. W. 847.

11. **Charities**—Benevolency.—where a will gave all of the testator's property to a Swedish society, and the instrument did not use the word charity or benevolent, the trust sought to be created cannot be upheld as a charitable trust, even though a letter showed that the testator intended his estate to be used for benevolent purposes, for "benevolency" is a much broader term than "charity," and includes objects and purposes not charitable. In Re Johnson's Estate, Ore., 196 Pac. 385.

12. **Chattel Mortgages**—Conditional Sale.—The buyer of an automobile under a conditional

sale contract has an equity therein for the amount he has paid, though the legal title remains in the seller, and he can execute a valid chattel mortgage covering such equity as security for the payment of the balance of the purchase price; and it is just as much a violation of Rev. St. 1909, § 4570, to remove and conceal property covered by a chattel mortgage on such an equity owned by defendant as if the mortgage covered a legal title owned by defendant. State v. Griffin, Mo., 228 S. W. 800.

13. ——Right of Action.—Where it was agreed between mortgagor and mortgagee that mortgagor could sell property, but could not deliver the property until the note secured by mortgage should have been paid, an action on the note after the property had been sold and delivered in part was not premature, although commenced prior to date specified as maturity; the note having become payable by the sale of property mortgaged. Bomer-Ferguson Co. v. Shapiro, La., 87 So. 729.

14. **Commerce**—Interstate.—An employee of an interstate carrier of gas, inspecting within the state an integral part of its pipe line transportation system, through which gas continuously passes destined for indiscriminate interstate and intrastate use, in search of a leak known to exist, is engaged in work so closely related to interstate commerce as to be part of it; and, in the absence of a mutual election to submit to the workmen's Compensation Act. The employer is not deprived of his common-law defenses at the suit of the employee for injuries sustained by him while engaged in such inspection and repair work. Miller v. United Fuel Gas Co., W. Va., 106 S. E. 419.

15. **Contracts**—Interstate Commerce.—A contract for the sale by a nonresident corporation to a resident dealer of medicine at wholesale rates to be resold by the dealer is a transaction in interstate commerce within the commerce clause of the federal Constitution, so that the foreign corporation was not required to comply with Acts 1907, No. 313, known as the Winer Act, which specified the terms and conditions on which the foreign corporation might do business within the state. Hogg v. J. R. Watkins Medical Co., Ark., 228 S. W. 730.

16. ——Mutuality.—Where, in response to an advertisement by a municipality for bids for the furnishing and delivery of coal for a period of 12 months, a bid is made to furnish a specified number of tons, and a contract is afterwards entered into for the delivery of so many tons per month at a given price and at a stated place, but it is expressly stipulated in the contract that the purchaser shall be at liberty at any time by a written notice to order a suspension of deliveries of the coal and to refuse to accept further deliveries, the element of mutuality is wanting in the contract. National Surety Co. v. City of Atlanta, Ga., 106 S. E. 179.

17. ——Public Policy.—Contract between labor union and contractors' association that men work only for latters members held contrary to public policy, and to deprive courts of jurisdiction. Brescia Const. Co. v. Stone Mason's Cont. Ass'n., N. Y., 187 N. Y. S. 77.

18. ——Violation of Specifications.—Where a contractor improperly constructed a terrace, and the owner, suing for the cost of repairing the same, did not rebuild it according to the plans and specifications, in that, in place of fill the flat arch of the terrace was supported by a foundation and a wall, but the cost was not greater than that of reconstruction, according to the plans and specifications, the defendant cannot complain. Cosden v. E. E. Paul Co., N. Y. 187 N. Y. S. 48.

19. **Corporations**—Abuse of Powers—Whether a corporation organized to engage in the business of operating safety deposit boxes, which is a lawful purpose, had abused the power given it by its charter, is a question that the state only may raise, and a conveyance by the corporation cannot be attacked as void because of such abuse of power. Kelly v. Lehmann, Ill., 130 N. E. 375.

20. ——Rescission of Sale of Stock—To rescind stock sale under agreement of seller to repurchase if buyer not satisfied property was as represented, facts must justify reasonable man in concluding representations false. Prime v. Squier, Neb., 181 N. W. 923.

21. **Deeds.**—Parent to Child.—When a deed is executed for a nominal consideration by an aged parent shortly before her death, where all the grantor's estate is conveyed to one child to the exclusion of her other children without any apparent reason for so doing, the courts will scruntinize the transaction with care; the presumption is against the validity of the deed. Winslow v. Winslow, 89 Neb., 189, 130 N. W. 1042, followed. Chase v. Lavelle, Neb., 131 N. W. 936.

22. **Domicile**—Mental capacity requisite to change.—Where an insane person's domicile was clearly in New York at the time of her commitment to a hospital in Virginia, her domicile remained in the former state, notwithstanding her presence in the other, unless changed by some competent or authorized person or tribunal, since she lacked the mental capacity to make such change. Commonwealth v. Kernochan, Va., 106 S. E. 367.

23. **Dower**—"Ancestral Estate."—An estate legally speaking, cannot come partly by gift and partly by purchase, but to be ancestral the conveyance must be made entirely in the consideration of blood, without any consideration deemed valuable, and if partly for valuable consideration it is a new acquisition, so that, where a husband, taking a grant from his father, assumed a small mortgage, one-half of which the father later agreed to pay, the husband's estate was a new acquisition and his widow's dower was in fee. Beard v. Beard, Ark., 228 S. W. 734.

24. ——Insurance.—Wife has no contingent right of dower in the proceeds of insurance policy on buildings on husband's land. Ford v. Street, Va., 106 S. E. 379.

25. **Eminent Domain**—Assessment of Damages.—In a proceeding under Boonton Charter § 19, to grade, curb, and pave a sidewalk, the assessment of damages involves the property as a res, regardless of the number of owners or the nature of their assets, and court erred in determining that person acquiring title to land could only recover damages done to her property subsequent to the time she bought it. Case v. Town of Boonton, N. J., 112 Atl. 822.

26. **Fixtures**—Electric Wiring.—Electric wiringinstalled by a tenant, the wires being incased in metal pipes securely fastened to the ceiling and walls, the junction boxes being surrounded by plaster, could not be removed on the theory that it was a trade fixture, the damage of removal greatly exceeding the value of the wire. Davidson v. Ginsberg, Iowa, 181 N. W. 661.

27. **Frauds**—Statute of Right of Action.—Where the owners of land sign a writing authorizing an agent to make a binding agreement for its sale at a net price to them, he to retain any excess as his commission, they agreeing to execute a deed to him or any one he may select, one with whom the agent makes an oral contract for a sale in excess of the minimum price named cannot maintain an action against the owners for specific performance, because the requirements of the statute of frauds is not met, by reason of his not being designated in the writing signed by the defendants. Banta v. Newbold, Kan., 196 Pac. 433.

28. **Fraudulent Conveyances** — Bulk Sales Statute.—The sale in bulk act of this state applies only to sales of "any stock of goods, wares, or merchandise in bulk" by a merchant, trader, or dealer in such articles. A bona fide purchaser for value of any stock of "goods wares, or merchandise in bulk" from a vendor who is not such a merchant, trader, or dealer acquires good title to the property, even though he has not complied with the terms of this act. Grove Mfg. Co. v. Salter, Ga., 106 S. E. 208.

29. **Guaranty**—Forbearance.—The mere forbearance of plaintiff to sue the debtor after receiving defendant's guaranty, without any request by defendant or agreement by plaintiff to forbear, is not consideration for the guaranty, especially where the debtor was insolvent. Allen West Commission Co. v. Richter, Mo., 228 S. W. 828.

30. **Habeas Corpus**—Valid Judgment Appealable.—If the proceedings affecting the custody

of children were such as to give the circuit court jurisdiction to make a valid order and judgment committing them to the superintendent and trustees of a soldiers' and sailors' orphans' home, such judgment must be regarded, on habeas corpus by the father to secure their custody, as final upon the facts as they then existed, appealable, but otherwise unassailable, like other judgments. McDonald v. Short, Ind., 130 N. E. 536.

31. **Highways**—Liability of Surety.—Where road contractor's bond extended its indemnity to laborers and materialmen in accordance with Acts 1899, c. 182, the surety is liable to persons furnishing food for laborers and animals engaged in performance of the contract; but it is not liable for goods furnished the contractor for its commissary, which were sold to outsiders as well as employees. Carter County v. Oliver-Hill Const. Co., Tenn., 228 S. W. 720.

32. ——Proper Supplies.—In a materialman's action on a contractor's bond, conditioned for the payment of persons furnishing supplies or provisions for carrying on the work, an amount due for tobacco, cigars, and cigarettes furnished the men held not supplies or provisions necessary to the prosecution of the work, and not to constitute a proper charge. Clatsop County v. Feldschau, Ore., 196 Pac. 379.

33. **Homestead** — Daughter's Property.—Where an unmarried woman, living with her parents and two sisters, purchased a house and lot adjoining the family homestead, and after the death of the mother and the destruction of the family home by fire the father and daughters moved into such house, and they were not dependent on any one member of the family as the head of the family, the daughters being self-supporting, and the father, if dependent on any, being dependent on all, the premises did not constitute a homestead. Hutchenrider v. Smith, Tex., 228 S. W. 989.

34. **Insurance**—Explosion.—Damage from blowing up neighboring building to prevent spread of fire within exception as to explosion; statutory provision may be avoided by express stipulation; exception not contrary to public policy.—Westchester Fire Ins. Co. v. Bell, Ga., 106 S. E. 186.

35. ——Hazardous Occupation.—Where the jury found that the holder of a benefit certificate gave to the clerk of his camp, as required by his certificate, notice of engaging in a hazardous occupation, and the corporation thereafter collected and retained the premiums paid at the original rate, it waived its right to forfeit the certificate for nonpayment of the additional premium required from those engaged in hazardous occupations. Hart v. Woodmen of the World., N. C., 106 S. E. 458.

36. **Internal Revenue**—Profit by Sale of Corporate Stock is "Income."—Under Income Tax Act 1916, § 2 (a), being Comp. St. § 6336b, defining income of a taxable person as including gains and profits from sales of real or personal property or from any source whatever, the difference between the market value of stock, on March 1, 1913, made the basis for determining gain by section 2 (c), and the price for which it was sold, was "income." Merchants' Loan & Trust Co. v. Smietanka, U. S. S. C. 41 Sup. Ct. 368.

37. **Intoxicating Liquors**—"Concurrent" Power.—The concurrent power given by Const. Amend. 18, § 2, to the states to enforce that amendment is similar to the power exercised by them in numerous cases, where acts already made offenses under the state law were made offenses under the United States law, with a provision that the latter law should not affect the jurisdiction of the states, and authorizes each to punish the same act as an offense against its sovereignty. United States v. Holt, U. S. D. C. 270 Fed. 639.

38. ——State Laws.—The definition of intoxicating liquor in section 2 of Gen. Laws, c. 138, which differs from such definition in the Volstead Act, passed pursuant to Const. U. S. Amend. 18, does not render inoperative the sections of chapter 138, which are generally appropriate for the enforcement of the prohibition enjoined on the commonwealth by the Eighteenth Amendment. Jones v. Cutting, Mass., 130 N. E. 271.

39. **Libel and Slander**—Privileged Communication.—During an investigation by the proprietor of a merchantile house of the loss of a pair of shoes, which one of the clerks admitted was taken by him, but not with a felonious intent, a charge by the proprietor that the clerk stole the shoes, made in the presence of one of the other clerks and to certain members of the family of the clerk charged with the theft when made only for the purpose of effecting a return of the shoes, was a privileged communication, made "in the performance of a private duty" and with a "bona fide intent * * * to protect his own interest in a matter where it is concerned." Shehan v. Keen, Ga., 106 S. E. 190.

40. **Master and Servant**—Corporate Officer Entitled to Compensation As "Employee.")—The president and treasurer of a cloak and suit company, owning 10 shares of it's 120 shares of capital stock, who was employed as manager, and as such performed services in packing, shipping, selling, and delivering goods, and who, while so doing, sustained injuries, is entitled to compensation as an employee for such injuries under the general provisions of the Workmen's Compensation Law; his case not being governed by or dependent upon the amendment to section 54 made in 1916. Skouitchi v. Chic Cloak & Suit Co., N. Y. 130 N. E. 299.

41. ——Death From Peneumonia.—In proceeding under the Workmen's Compensation Law to recover compensation for the death of an employe from pneumonia, evidence that the employe had received a slight injury to his chest the day before he was taken sick, and expert testimony that the injury was the inciting cause of the pneumonia held sufficient to sustain an award of compensation by the Commission. Delso v. Crucible Steel Co. of America, N. Y. 187 N. Y. S. 68.

42. ——Employers' Liability Act.—In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries caused by the railroad's violation of the Ash Pan Act (U. S. Comp. St. § 8624), the railroad could not defend on the plea of assumed risk or contributory negligence, in view of Federal Employers' Liability Act § 4 (Comp. St. § 8660), and Employers' Liability Act 1908, §§ 1-4 (Comp. St. §§ 8657-8660). Ft. Worth & D. C. Ry. Co. v. Smithers, Tex., 228 S. W. 637.

43. ——Hazardous Work.—Where dangerous and extrahazardous work, bringing the employer within the Workmen's Compensation Act without election, was being done for him in maintaing his building, when his contractor's employes were injured, he cannot escape liability for compensation, under the Workmen's Compensation Act, § 31, on the claim he was engaged in the business of a hardware and paint merchant, and was not engaged in the extrahazardous business of maintaining the building. Davis v. Industrial Commission, Ill., 130 N. E. 333.

44. ——Hazard of Employment.—Injury while using elevator in premises leased to employer held compensable "incident and hazard of employment."—Latter's Case, Mass., 130 N. E. 637.

45. Injury by Fellow Servant.—Generally, where an employee is intentionally injured by a fellow servant, there is no liability under the Workmen's Compensation Act. Milne v. Sanders, Tenn., 228 S. W. 702.

46. ——Member of Family.—Child of undivorced wife, living in adultery with unmarried man, held a "dependent" member of his "family" or "household" within Compensation Act.—Moore Shipbuilding Corporation v. Industrial Accident Commission, Cal., 196 Pac. 257.

47. ——Negligence.—An employe in charge of boiler house in which were pipes which were likely to be damaged by operations of employe of one who had purchased boilers, and was cutting them and removing them, was not a mere volunteer in seeking to avert damage from the falling of segments and in pausing a moment to see how purchaser's employe got on with the affair. Carpenter v. Salmon Falls Mfg. Co., N. H. 112 Atl. 909.

48. ——Proximate Cause of Injury.—Where a car not equipped with couplers as required by

Safety Appliance Act, § 2 (Comp. St. § 8606), was standing on a siding, and a train crew kicking cars on the siding, did not intend to disturb move or couple to the crippled car, and it was the duty of a brakeman to stop the moving cars before coming in contact with the crippled car, but he failed to perform such duty, and his foot was caught between the moving cars and the crippled car, the collision was not the proximate result of the defect in the car. Lang v. New York Cent. R. Co., U. S. S. C., 41 Sup. Ct. 381.

49. **Mines and Minerals**—Price of Coal Lands. —Rev. St. § 2347 (Comp. St. § 4659), providing for the sale of coal lands within 15 miles of a railroad for not less than $20 an acre, does not require that such land shall be sold at that price, and the Secretary of the Interior may classify and appraise the land and place a higher selling price thereon, notwithstanding the practice of the department from 1873 to 1907 to sell at such minimum price, the prior legislation (Act July 1, 1864, Act March 3, 1865, and Act March 3, 1873), and the fact that such construction puts no restraint on the Secretary of the Interior, especially where no arbitrary abuse of power is claimed; as "less" and "more" are words of contrast and opposition and cannot be confounded. Friedman v. United States. U. S. S. C., 41 Sup. Ct. 380.

50. **Mortgages**—Priority.—A judgment creditor and a mechanic's lien holder, who could have levied upon and sold the entire homestead upon paying the $5,000 exemption, were not guilty of laches subordinating their rights to that of subsequent mortgagee because interest was accumulating, since neither law nor equity requires a prior lienholder to enforce his lien for the benefit of subsequent lienholders, and, besides, the mortgagee could have paid off the prior liens and become subrogated to the rights of such lienholders, thus stoppin the accumulation of interest on the judgment. Peter Mintener Lumber Co. v. Janisch, S. D., 181 N. W. 914.

51. **Municipal Corporations**—Diversion of Park Property.—In view of Special El Paso City Charter, §§ 54, 93, providing that porperty acquired by the city for park purposes shall be inalienable, and for the construction and repair of sidewalks and crossways thereon the construction of a sidewalk on a 14-foot strip on the edge of a park, for the use of a party with whom the city was adjusting a lawsuit, is a diversion of park property which may be enjoined. Look v. El Paso Union Passenger Depot Co., Tex., 228 S. W. 917.

52. ——Ice on Sidewalk.—While a city is not liable for injuries from a general slippery condition of a sidewalk, made so from an accumulation of snow or ice through natural causes, nevertheless liability may exist where such snow or ice has been so changed in form from its original condition as to become an obstruction to travel by reason of being rough and uneven. City of Linton v. Jones, Ind., 130 N. E. 541.

53. ——Sewer Assessment Area.—It was within the legislative power of a city council, in fixing the assessment area on account of the construction of a sewer, to cut lots at the corner of intersection streets already supplied with sewers by diagonal lines, so as to exclude parts and reduce the assessment area. Leonhardt v. City of Yonkers, N. Y., 187 N. Y. S. 27.

54. ——Violation of Agreement.—Where city and owners claiming ownership of batture entered into agreement whereby each relinquished to the other claims to portion thereof, and whereby city agreed not to sell any of the batture abandoned to it, and to confine its use to commerce, the city's non-compliance with such agreement did not give the owners, as parties to such contract, a right of action against the city, the city's obligation being in favor of the public, and not in favor of the owners as private individuals, and the only right of action for noncompliance therewith being in the citizens and taxpayers. Hunt v. City of New Orleans, La., 87 So. 736.

55. **Railroads**—Liable as Insurer for Fire — Under Rev. St. c. 57, § 63, a railroad which is liable for fire communicated by its locomotive is in effect an insurer. Pine Spring Sanitarium Co. v. Grand Trunk Ry. Co., Me., 112 Atl., 90.

56. **Sales**—Condition.—Although the property was delivered by the plantiff's vendee to the defendant under a contract of sale between them, by the terms of which the defendant was, as a condition to the sale, to cause promissory notes to be executed to the plaintiff's vendee for the payment of the purchase money, no title passed into the defendant because of his failure to execute the notes. Everroad v. Dickson Planing Mill Co., Ga., 106 S. E. 193.

57. **Taxation**—Condition to do Business.— The state may require, as the condition of a grant to do business to a corporation, payment of a specific sum based on the gross receipts, or of any sum to be ascertained in any convenient mode the Legislature may prescribe. Bergen Aqueduct Co. v. State Board of Taxes, N. J. 112 Atl. 881.

58. **Vendor and Purchaser** — Rescission. — Where the buyer of property did not rescind the contract on account of the seller's failure on April 9, at the time and place provided for in the contract for delivery of the deed, and asked for an adjournment of passing of title to give him time to obtain the money which he was required to pay, he thereby kept the contract alive for the benefit of both parties, and waived any previous breach as a ground for rescission, and, having failed to appear at the adjourned date, when the seller was ready to deliver the deed, the buyer is not entitled to recover his deposit, or the cost of searching the title, having breached the contract himself. Feingold v. Scardaccione, N. Y. 187 N. Y. S. 68.

59. **Wills**—Devise in Trust.—Devise in trust for "grandchildren" held not applicable to children of testator's child not named in will.— In re Van Wyck's Estate, Cal., 196 Pac. 50.

60. ——Foreign Probation.—A will made and probated in a foreign state has no effect as a conveyance as to property in this state until the same is probated. But when it is probated here it will relate back to the death of the testator and be given effect unless the property or some of it has been acquired in good faith for value by a person without notice of the existence of the will. A person buying with notice of the will takes the property subject to t will being probated. Belt v. Adams, Miss., 87 So. 666.

61. ——"Issue" is Not Equivalent to "Heirs of the Body."—The term "issue," as used in a will, is not in itself the equivalent of the technical phrase "heirs of the body," and is so construed only when probably so intended by the testator. In re Lawrence Savings & Trust Co. Pa., 112 Atl. 913.

62. ——Lost Will.—Under Civ. Code 1910, § 3863, providing that a copy of a lost or destroyed will, clearly proved to be such by the subscribing witnesses and other evidence, may be probated, a copy of a lost will could not be probated on evidence of the existence and contents of the will and its destruction by fi without producing the living witnesses, though it was admitted that, if present, they would testify that they had no recollection of witnessing the will, but might have done so. Smith v. Smith, Ga., 106 S. E. 95.

63. ——Restraint on Alienation.—Where a testator, after devising real and personal property to a niece and her heirs forever, further provided that she should have no right to convey a particular piece of real estate for 25 years, the restraint on alienation was an attempt to withhold an inseparable quality of a fee-simple estate and was void, especially where there was no devise over and no provision for forfeiture on alienation. Pattin v. Scott, Pa., 112 Atl. 911.

64. ——Undue Influence.—The mere fact that the attorney who drew the will is named as executor creates no presumption of undue influence, and does not shift the burden of proof on such issue to such executor on contest of the will. In re Le Gault's Estate, Ore., 196 Pac. 254.

65. **Witnesses**—Privileged Communication.— What the physician learned by observation and examination of the patient, as well as by verbal communication, is privileged under Code § 4608. Walmer-Roberts v. Hennessey, Iowa, 181 N. W. 798.